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No. 76-204

In the Supreme Court of the United States

OCTOBER TERM, 1976

BERNARD FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the mailings on which his mail fraud conviction was based were not mailed, caused to be mailed, or received from the mails for the purpose of executing the fraudulent scheme.

After a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of four counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to six months' imprisonment on the first count.The district court suspended imposition of sentence on the remaining counts in favor of three years' probation, as a condition of which petitioner was required to make restitution in the amount of $25,000 to the county treasurer. The court of appeals affirmed (Pet. App. A).

There is no essential dispute concerning the underlying facts relating to the issue raised by the petition. These facts are accurately summarized in the opinion of the court of appeals (Pet. App. 2a-6a). Petitioner was the beneficial owner as a conditional sale vendee of two parcels of real estate containing buildings from which he received rental income. He conceived a scheme to defraud the county by having the property assessed for the year 1971 at less than actual value. He received demolition permits for the buildings on November 17, 1971, and actual demolition was carried out during February 1972. He presented the county assessment appeals board, however, with claims of overassessment that he substantiated with demolition permits bearing the forged date of June 17, 1971. As a result, he received reduced assessments (based on the asserted removal of improvements to the parcels), which lowered his taxes by $24,000 for one parcel and $3,500 for the other. His presentation to the appeals board was made in person on February 2, 1972.

The four mailings counts upon which petitioner was convicted were based upon: (1) a letter that he mailed to the conditional sale vendor of one of the parcels on January 15, 1972, requesting that the latter, upon receipt of the official assessment notice, send it to him so that a complaint could be filed for any overassessment;[1] (2) a letter to him from the conditional sale vendor dated January 31, 1972, enclosing the assessment notice; (3) and (4) the official tax bills (after assessment had been reduced) for the two parcels, mailed to him as required by law by the county treasurer in April 1972.

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[1]The letter also complained of the vendor's proposed proration of taxes and expenses and took the vendor to task for failing to monitor the county's assessment procedure (see Pet. App. E).

The court of appeals correctly held that all four mailings were for the purpose of executing the fraudulent scheme. As the trier of fact, the district court properly found (see Pet. App. 13a) that the scheme came into being prior to the date upon which petitioner first wrote to the conditional sale vendor. Since it was necessary for him to know the amounts at which his property had been assessed in order to make his fraudulent claims for reassessment, his letter to the vendor and the latter's reply were necessary steps in the scheme. It is immaterial that, as he contends (Pet. 16), he could have obtained the necessary information in other ways; he in fact obtained it through use of the mails. Similarly, while he obtained his fraudulently procured reassessment on February 2, 1972, the scheme did not come to full fruition until he obtained the financial benefits he was seeking—understated tax bills. Hence, his receipt of the officially mailed tax bills were also steps in the scheme to defraud. "It is not necessary that the scheme contemplate the use of the mails as an essential element." *Pereira* v. *United States*, 347 U.S. 1, 8. It is enough that there were mailings for the purpose of executing this scheme.

The mailings were thus not wholly tangential to the scheme, as were the mailings in *Parr* v. *United States*, 363 U.S. 370, *United States* v. *Maze*, 414 U.S. 395, and *Kann* v. *United States*, 323 U.S. 88. In *Parr*, the scheme involved fraudulent conversion of local government funds; while the mailings were, as in this case, required to be made by law, they were valid tax assessments, tax bills, and payments of taxes, not—as here—tax bills that were lower than they should have been because of petitioner's fraudulent scheme. In *Maze* and *Kann*, the mailings occurred after the defendants had received the fruits of their fraudulent schemes; here, in contrast, the mailings triggered the scheme and brought to petitioner its fruits.

The mailings, in short, were not "immaterial" to the execution of the scheme (*United States* v. *Maze, supra,* 414 U.S. at 401), but rather were directly related to it.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[2]Petitioner's sentence of three years' probation on the two counts involving the mailings of the tax bills is concurrent with the sentence on the count involving the mailing of the assessment notice to him by the vendor (see p. 1, *supra*). To the extent that petitioner's contentions focus on the tax bill mailings, this Court may decline to consider them. *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16.